

1 MR. FENSKE: While Exhibit A is a letter that I do
2 not know if Mr. Kay sent through me. I don't know how he
3 received it. It's a letter from Mr. Killian to Terry
4 Fischel in which he --

5 JUDGE SIPPEL: Mr. Fischel is a Commission
6 employee?

7 MR. FENSKE: That's correct, and which --

8 MR. KNOWLES-KELLETT: Your Honor, in the case of -
9 - stamped, he probably got it from a FOIA request.

10 MR. FENSKE: I -- that probably is true, but I
11 honestly don't know. But the other --

12 MR. KNOWLES-KELLETT: He's got thousands of
13 documents in FOIA requests. It's more than likely than not.

14 MR. FENSKE: That -- I can't argue with you. The
15 other documents, I guess Exhibit B through F are telephone
16 references.

17 JUDGE SIPPEL: Right. I see that.

18 MR. FENSKE: Indicating that Mr. Killian does,
19 indeed, have his operations in the same city as Mr. Kay
20 evidencing the fact -- supporting the fact, I should say,
21 that they are indeed competitors in various licenses and
22 what not further evidencing our very strong belief. I think
23 it's a fact that they are indeed competitors, contrary to
24 what was sworn to the in the earlier pleading.

25 JUDGE SIPPEL: Well, I'm not -- I'm not going to

1 draw any conclusions on that. As you know, we're not near
2 that stage yet. But, as I say, you can make the argument
3 and to a reasonable degree, you can ask the questions of Mr.
4 Killian with respect to those points. You've got examples
5 in items A through G now. Of course, if it's a telephone
6 directory thing, you're not going to spend a lot of time on
7 that. I mean, that speaks for itself. But if you've got a
8 letter ... I think I've said enough on that.

9 MR. FENSKE: Well, if I may, I think you have just
10 authorized questioning into that level -- into that issue of
11 whether or not they are competitors. I think, if I
12 understood you correctly, you --

13 JUDGE SIPPEL: That's correct. Up to -- but,
14 again, it's a question of degree and I'm relying upon what
15 Mr. Schaubel represented to me when I issued that order that
16 there's going -- that he will not object up to a certain
17 point. Everything is a question of degree here.

18 MR. FENSKE: Understood.

19 JUDGE SIPPEL: Okay. As long as we understand
20 that, that's fair game. I mean, you can --

21 MR. FENSKE: My last point -- I believe my last
22 point on that is, of course, in our book and I think rightly
23 so, that line of questioning does go to credibility because
24 if he made a sworn statement that he filed with the
25 Commission that they are not competitors, I just want to

1 make it clear on the record so that everybody believes that
2 affects credibility and I want to make sure that's not
3 inconsistent with your prior ruling. I don't believe it is,
4 but we might as well address it here instead of calling from
5 sunny Los Angeles.

6 JUDGE SIPPEL: Well, I think I -- I think I have
7 answered your point. I'm saying up to -- within -- within
8 the realms of the limitations that we have talked about
9 here, I'm going to permit questions in that area. You've
10 got specific documents to present him with. What I don't
11 want to happen is I don't want to have additional evidence
12 over and above this document being brought in to try and
13 nail your point home. You've got legitimate inquiries to
14 make having to do with the nature of the competition or the
15 noncompetition or the scope of it, or when it began and when
16 it didn't within limitations. That is not what this case is
17 about, though. This case is about the issues that are in
18 the hearing designation order.

19 MR. FENSKE: I understand.

20 JUDGE SIPPEL: That's okay, as long as you
21 understand that. Mr. Gehman, do you want to say anymore
22 about that?

23 MR. GEHMAN: I want to respond to what he read on
24 the record of my statement earlier. Mr. Killian -- and then
25 secondarily, Mr. Killian also wants to respond to Kay's

1 opposition, but this may not be the time or the place to do
2 it depending as you suggest.

3 First of all, I want to say that my understanding
4 earlier was that Kay and Killian were, you know, kind of
5 competitors on the margins and so, that prompted the earlier
6 remark that I made that's on the record. I went back and
7 questioned Mr. Killian about this. After that hearing, he
8 gave me more information which prompted the next pleading
9 that he's referring to. So that was based on additional
10 information I got from Mr. Killian and, you know, the point
11 I'm making is that what he read on the record earlier should
12 not be construed as impeaching this pleading that I just put
13 in last week.

14 JUDGE SIPPEL: Well, I'm not taking anything here
15 as a basis for making any individual finding or conclusion.
16 All we're talking about here are basically some rules under
17 which these depositions are going to be taken out in
18 California. There is nothing being determinative -- no
19 determinations are being reached here this morning. I
20 understand what the argument of counsel is. I've heard
21 arguments of counsel for a long time, so I can tell an
22 argument when I hear it, but there's going to come a
23 different day when we're going to get into the findings,
24 proposed findings and conclusions. Right now, we're just
25 talking about going out and getting information, and I don't

1 want a witness being held over for two or three days because
2 of some ancillary issue that somebody would like to go down
3 that road. I don't want them to go down that road. That's
4 all.

5 I think I have given you fair leeway with respect
6 to what you're looking for on credibility, and I think that
7 it's right that you do ask those questions. In addition to
8 that, any correspondence that you have through your FOIA
9 request that tie Mr. Killian into communicating with the
10 Commission and information that he has received back from
11 the Commission, you certainly can ask him about that in
12 terms of what is the -- in other words, the bottom line
13 being what is the nature, and the scope and the depth of
14 your contacts with the Commission about these things, and
15 what were you receiving back from the Commission. So, to
16 that extent, there is an item in the subpoena that bears on
17 that information.

18 Let me pinpoint that to you directly ... Schedule
19 A of item 2 on the subpoena and on your deposition request
20 with respect to Mr. Killian. That would be documents
21 concerning communications to and from the FCC, et cetera,
22 regarding Kay, Kay's business or any agents thereof. Do you
23 see where I'm at Mr. Gehman?

24 MR. GEHMAN: Yes, yes.

25

1 JUDGE SIPPEL: Now, those documents looking at the
2 nature of the documents that have been attached to these
3 exhibits to these exhibits that are attached to -- if I've
4 got the pleading right, I believe that's your reply -- your
5 ultimate reply pleading -- a response pleading to --

6 MR. FENSKE: They were filed yesterday?

7 JUDGE SIPPEL: Yes, sir.

8 MR. FENSKE: Yes, that's correct.

9 JUDGE SIPPEL: Okay.

10 MR. FENSKE: We just filed a joint reply to your -

11 -

12 JUDGE SIPPEL: It's a joint reply.

13 MR. FENSKE: -- with respect of --

14 JUDGE SIPPEL: Well, I just, for record purposes,
15 I want to be sure I'm referring to the right pleading
16 because there have been a series of pleadings going in and
17 out of this. But, in any event, that's the one I'm talking
18 about.

19 There's been -- you've shown me that you do have
20 evidence with respect to contacts by Mr. Killian with the
21 Commission, and I'm saying that the subpoena that calls for
22 that kind of information, that should not be a difficult
23 item to honor, I mean, that is to find, to determine on the
24 part of Mr. Killian and that information, and that
25 information -- any documents, other than those of course

1 that you already know that Mr. Kay has, should be brought
2 into the deposition.

3 Do you follow what I'm saying?

4 MR. GEHMAN: Yes, I do.

5 JUDGE SIPPEL: Item 2 of Schedule A is fair game.

6 MR. GEHMAN: Yes.

7 JUDGE SIPPEL: If Mr. Kay doesn't have everything
8 that Mr. Killian has on that, Mr. Killian should bring the
9 balance in with him. If Mr. Killian and Mr. Kay already has
10 everything that he's obtained from the Bureau, i.e. what is
11 evidenced by Exhibits A through G, then there shouldn't be -
12 - then that should be the end of the discussion.

13 MR. GEHMAN: Okay. Does this include information
14 that was submitted under request for confidentiality?

15 JUDGE SIPPEL: Well, you're going to have to raise
16 that then, find out -- those documents are going to be
17 identified. We're going to find out what the nature of the
18 confidentiality is.

19 MR. GEHMAN: Okay.

20 JUDGE SIPPEL: I mean, if he has submitted it
21 under either -- if he said, "You can have this under the
22 condition that it's treated as confidential," and that's
23 where it rests, or, certainly if he gets a commitment back
24 from the Bureau saying that this will be treated as
25 confidential. As an example, the informer's privilege under

1 FOIA or something like that. All right. Then I want to end
2 up with a list of those documents. They don't have to be
3 produced at the deposition.

4 MR. GEHMAN: Yeah.

5 JUDGE SIPPEL: All right. But that has to be
6 stated on the record that there are such documents. All
7 right. And then, you know, either at or thereafter -- we'll
8 have to just deal with it at that time. If you find out
9 anything more ahead you time, you let me know.

10 MR. GEHMAN: Yeah.

11 JUDGE SIPPEL: But I would, first of all, want to
12 see a list of those documents and then it would -- it could
13 reach a point where I'd be looking at those in camera.

14 MR. FENSKE: Your Honor, is that something that
15 maybe counsel and Your Honor is all familiar with, the
16 Vaughn index, is that something that could be prepared if --

17 JUDGE SIPPEL: I hope it doesn't have to be a
18 Vaughn index. I mean, it doesn't have to be anything that
19 extensive. All it has to be is just an accounting, just a
20 description of documents.

21 MR. FENSKE: Are we going to --

22 JUDGE SIPPEL: That's essentially what a Vaughn
23 index is.

24 MR. FENSKE: Correct. Understood. Are we going
25 to see that or is it going to be directed just to you. If

1 indeed we are going to go down this path, --

2 JUDGE SIPPEL: Well, let's find out, first of all,
3 whether it's there. Initially, I would want to see the
4 documents -- I would want to see the list in camera and
5 get -- and have the Bureau, you know, give the Bureau an
6 opportunity to respond to it for purposes of -- for how
7 these things are handled administratively under the FOIA.
8 All right. But, you'll ultimately -- I'm sure you'll end up
9 seeing the list, at least.

10 MR. FENSKE: Well, just so everybody is clear, I
11 fully intend to ask what documents were produced in response
12 to the subpoena and what documents weren't. I think that's
13 kind of sporting of us. I'm just telling you that's my
14 intentions right now. I think that's a fair question at
15 deposition.

16 JUDGE SIPPEL: Right. Well, you can do that and,
17 as I said, I told Mr. Gehman -- Mr. Gehman raised the
18 question what about if they were submitted under a condition
19 of confidentiality and I've gone down that road with him and
20 said, yes, if there's confidentiality connected with the
21 documents, he doesn't have to produce them at the deposition
22 but he has to state, for the record, that he does have such
23 documents and then, we'll take it from there --

24 MR. FENSKE: Understood.

25 JUDGE SIPPEL: -- starting with the list --

1 MR. FENSKE: Understood.

2 JUDGE SIPPEL: And, you know, we'll peel the
3 banana as we have to. As quickly as we can but I've to be
4 very careful that the internal provisions of the FOIA
5 procedures are also being complied with, so I don't want to
6 rush ahead. I don't want to rush too fast on that, but
7 we'll get to it. So the only thing that I'm requiring Mr.
8 Killian to come forward with is item 2 of Schedule A to the
9 subpoena and the notice.

10 MR. GEHMAN: Okay.

11 JUDGE SIPPEL: Under the conditions that I've just
12 outlined here.

13 MR. GEHMAN: Sure.

14 JUDGE SIPPEL: Everything else on that Schedule A,
15 you know, in my judgement, it's over burdensome and it gets
16 into -- it opens the areas into ancillary inquiries that I
17 feel are going to unduly extend the deposition and/or his
18 testimony.

19 MR. FENSKE: Your Honor, to the extent that this
20 is necessary, I would like to note a formal objection, for
21 lack of a better word, on the record as to that ruling. I
22 don't want you to revisit it, but I do want to point out we
23 note an objection as to items 1 through 7, but I would like
24 to specifically point out number 7 because that was kind of
25 new, for lack of a better word, and I believe it's totally

1 relevant and Lenny gave you the very brief background.

2 Mr. Killian testified essentially that he or
3 certain others, I believe they were on his staff, made
4 records -- made telephone calls to various of Kay's
5 customers in which hypothetically questions were asked
6 concerning construction and loading. Item number 7 on
7 Schedule A relates directly to that line of testimony, and
8 we believe that that is something we should be entitled to
9 review.

10 JUDGE SIPPEL: Mr. Gehman?

11 MR. GEHMAN: First, I'd like note, it's not new.
12 This -- the information that he's referring to was provided
13 to Mr. Kay back in I think it was 1995 in response to his
14 Interrogatory. So he's been aware of it now for upwards of
15 about four years.

16 MR. FENSKE: I want to make sure we're on the same
17 page. I'm not talking about the items on Exhibit G. I'm
18 talking about phone records. I think that's what -- that's
19 primarily but not inclusively what item number 7 refers to.

20 JUDGE SIPPEL: Yes, I'm familiar with this line of
21 argument that you're making. I'm not sure where I picked it
22 up from but it was in one of the pleadings. As I understand
23 it -- well, let me hear from Mr. Schaubel.

24 MR. FENSKE: It might have been in the request for
25 subpoena that we submitted.

1 JUDGE SIPPEL: All right. Mr. Schaubel? Well,
2 that was -- that's another thing. That came in the day
3 after the subpoenas. You've got to give me better notice on
4 these. You just have to give me better notice.

5 MR. FENSKE: That whole procedure has been
6 clarified.

7 JUDGE SIPPEL: All right.

8 MR. FENSKE: And I thank you for that.

9 JUDGE SIPPEL: All right. Mr. Schaubel?

10 MR. SCHAUBEL: Your Honor, I'm not sure -- was Mr.
11 Gehman finished in terms of his comments on --

12 JUDGE SIPPEL: Well, we can go back to him. I
13 want to hear what you have to say. I mean, do you -- I
14 mean, I understand -- I understand exactly what Mr. Fenske
15 is telling me here. That there is testimony from Mr.
16 Killian that telephone calls were made to determine certain
17 information that he collated or he sought to be collated
18 somehow or another. And the question is that Mr. Fenske is
19 asking is well what about getting the telephone records that
20 prove that those calls were actually made to gather the
21 information.

22 MR. SCHAUBEL: Your Honor, I guess my reaction,
23 and this is -- this is probably something that Mr. Gehman
24 can comment better on than I can, is would digging up those
25 -- would the burden of going through, digging and locating

1 those records be, you know, out weigh any relevant -- any
2 potential relevance of that testimony. Because my concern
3 is if you have a mass of telephone records, going through
4 and determining what records would be, you know, what
5 records related to the calls in question, or on the other
6 hand, there could be a potential privacy -- if you just
7 produce phone record en mass, they could produce all sorts
8 of irrelevant and possibly private information. I don't
9 know exactly what sort of format or --

10 JUDGE SIPPEL: Well, if we went down that road,
11 you know, you'd mask out the things that don't pertain.
12 You'd just leave the line on that shows that this call was
13 made on a particular date.

14 MR. KNOWLES-KELLETT: There's also the problem,
15 Your Honor, that, you know, it only buttresses our testimony
16 -- Mr. Killian's testimony if the record is there. It
17 doesn't prove anything if the phone record is not there
18 because somebody could have used a different phone. They
19 may not be complete phone records. You know, there's no way
20 that his office phone record, if there's numerous callers,
21 you know, could have -- he's never going to be able to
22 represent that they are complete. So Mr. Kay would be
23 trying to prove something by the absence of a particular
24 call and that's not going to be possible.

25 JUDGE SIPPEL: Well, there's another way of using

1 that information, but let me hear -- Mr. Gehman, how
2 burdensome would it be to pick out telephone billings that
3 would identify these calls or say, even a sampling of them.

4 MR. GEHMAN: Okay. Let me -- let me say what I
5 know. I've asked Mr. Killian about his phone records, and
6 Killian's description is this, that his salesmen kept kind
7 of a running set of loose-leaf binders, each page being a
8 different potential radio customer, and this was on a --
9 some sort of form. You know, the name, address, number of
10 radios. Do you have any further interest in purchasing
11 radios, that sort of thing. However, he no longer has
12 those. This is from 1991 and 1992. He has basically
13 checked out of that market and he just did not retain those
14 records.

15 Now, if he had those, it wouldn't be burdensome to
16 produce them. But, he doesn't have them. Going beyond
17 that, and looking at, back in 1991 and 1992, trying to get,
18 say, an itemization from the telephone company or going back
19 and pulling his own old phone records from -- who is it --
20 Pacific Bell -- whoever the telephone company is, I think
21 that would be quite burdensome, and I don't -- I questioned
22 whether or no he even has that, as well.

23 JUDGE SIPPEL: This is the time period that this
24 information was collected was 1991 to 1992?

25 MR. GEHMAN: Yes. The letter in question was

1 written some time in 1992, and the information is from '91
2 and early '92.

3 JUDGE SIPPEL: Oh, again, this is your Exhibit --
4 this is the Exhibit -- not your's, but this is the Exhibit G
5 letter, May 15, 1992; is that correct?

6 MR. GEHMAN: Yes, Your Honor, all Exhibits, I
7 believe, 2 through -- Killian Deposition Exhibits 2 through
8 9 are all attached as Exhibit G to the reply pleading ---
9 joint reply pleading that was filed yesterday. There are a
10 number of deposition exhibits attached as one exhibit.

11 JUDGE SIPPEL: Well, I'll permit you to, you know,
12 I'll permit you to establish this, if you want to call it,
13 methodology testimony or certainly the status testimony with
14 respect to your items, seven documents. I mean, you can ask
15 Mr. Killian, in other words, questions to corroborate or
16 confirm or see what his story is with respect to what Mr.
17 Gehman is saying, i.e., how the information was collected,
18 how it was recorded, where are the records now, how
19 burdensome would it be to reconstruct through whatever it is
20 -- Pacific Bell records. You can lay that foundation and,
21 you know, I'll consider a further request if that becomes --
22 you know, if you lay the foundation.

23 Again, I come back to my initial query in this.
24 If there are -- if you have -- if you are arguably taking
25 the position that the methodology for putting the data

1 together, seriously lacks reliability and cannot be
2 corroborated with backup material, backup documentation
3 then, you know, that's your argument. That's the guts of
4 your argument. To give them a chance to -- to give Mr.
5 Killian a chance to go back and patch it up, I'm not so sure
6 where that comes out in terms of assisting your case. But,
7 you know, that's your call. Not mine. But, that's why I
8 was asking that question up front. Because we're going to
9 have to face that. I mean at some point this evidence is
10 going to be assumably -- I'm assuming, sitting here today,
11 that the Bureau is going to try and introduce this evidence
12 at some point at the hearing, and that's when the
13 evidentiary -- that's when the strict application of the
14 evidentiary rules apply.

15 MR. GEHMAN: Right.

16 JUDGE SIPPEL: So I -- I'm going to say no more
17 about it but, yes, you certainly may lay the foundation with
18 respect to item 7. But everything else on that Schedule A
19 with the exception of item 2, which we have already
20 discussed at length and this item 7 with respect to, you
21 know, going into his collection and record-keeping and
22 retaining information. Everything else on that subpoena is
23 -- consider it quashed.

24 MR. GEHMAN: Okay.

25 JUDGE SIPPEL: All right. And, I don't mean to

1 say it in a -- in a belittling way. I'm just saying that
2 I've looked at it very carefully. I've looked at the papers
3 carefully and I -- I'm, in my judgment, I just feel that the
4 information for Mr. Killian can be obtained without the need
5 to go into those types of documents.

6 Mr. Gehman?

7 MR. GEHMAN: Could I ask a clarifying question
8 with respect to item 7, if I understood you correctly, what
9 you said is that Mr. Killian does not, at this deposition,
10 need to produce or look for item 7, rather Kay's counsel can
11 question Mr. Killian about the documents referenced in item
12 7, and they are free to file a further motion seeking
13 production at some later date?

14 JUDGE SIPPEL: That's essentially correct. Now,
15 he has an obligation, and I want you, because I'm basing
16 this ruling on what I'm hearing from you, he has an
17 obligation to review, not necessarily go back into his
18 records and review, but he has an obligation to go into that
19 deposition with some knowledge about this area.

20 MR. GEHMAN: Sure.

21 MR. SCHAUBEL: And not just say, "Well I didn't
22 know you were going to ask me questions about that."

23 MR. GEHMAN: Okay.

24 JUDGE SIPPEL: So there has to be -- I mean this
25 is a two-way street. I mean there has to be good faith on

1 both sides.

2 MR. GEHMAN: Yeah.

3 JUDGE SIPPEL: And I'm assuming also -- I mean,
4 I'm sure that this area already, to a degree, has already
5 been gotten into. He did testify at some point, didn't he?

6 MR. GEHMAN: Yes, and that quote that I read
7 earlier is about these very records.

8 JUDGE SIPPEL: All right. Well, that's the long
9 and short of that.

10 MR. GEHMAN: Okay. Thank you.

11 JUDGE SIPPEL: Now, that's all that I have with
12 respect to Mr. Killian and, as I promised you up front, Mr.
13 Gehman, you may leave if you wish to. I do want to say
14 before you go that I would -- I want to give the same
15 protections to -- is it Mr. Barnett, Mr. Barrett?

16 MR. SCHAUBEL: Barnett.

17 JUDGE SIPPEL: Barnett, who is not here today and
18 who I -- and the reason I am asking you this question before
19 you leave, Mr. Gehman, is there any connection between Mr.
20 Barnett and Mr. Killian? You know, are they in business or
21 do they know each other? Is there any --

22 MR. GEHMAN: Not that I'm aware of.

23 MR. SCHAUBEL: Not that we're aware of either,
24 Your Honor.

25 JUDGE SIPPEL: Then I guess there's nothing more

1 that -- there's no other --

2 MR. GEHMAN: He would know more than the rest of
3 us.

4 JUDGE SIPPEL: Well, I'm just trying to see if
5 there's some -- if there's something that could be relayed
6 between you. But, no, there's not. There's nothing there.

7 MR. GEHMAN: I don't represent Mr. Barnett.

8 JUDGE SIPPEL: All right. Then, you may stay or
9 you may leave.

10 MR. GEHMAN: Thank you.

11 JUDGE SIPPEL: Thank you, Mr. Gehman.

12 (Mr. Gehman leaves proceedings.)

13 JUDGE SIPPEL: What can we do, since we're on the
14 same line of questioning or the same line of subject matter,
15 rather, what can we do with respect to Mr. Barnett? Again,
16 there's a broad subpoena out with respect to documents.
17 He's a relevant witness to the case, based upon what was on
18 the -- how he was described on the Bureau's prospective --
19 initial prospective witness list. So I have no problem with
20 him being deposed at all, but I --

21 MR. KNOWLES-KELLETT: In accordance with your
22 order, Your Honor, we faxed a copy of your order to Mr.
23 Barnett's counsel and also to Mr. Barnett, and he indicated
24 -- we didn't discuss at length with him today. We discussed
25 that this was going on with him. At the same time, we

1 discussed scheduling of his deposition and he indicated he
2 didn't see a need to participate today. We indicated that
3 such participation could be as limited as a letter served on
4 all parties, and so, I don't know what that means.

5 I think that in terms documents he's likely to
6 have very few documents.

7 JUDGE SIPPEL: That may be the simple answer to
8 it. He may just come in with a few documents or just say
9 that I don't have anything like this.

10 MR. KNOWLES-KELLETT: Right. I do not know the
11 answer to that. We have not discussed that with him. But I
12 think that in terms of length of deposition, they've
13 scheduled him for a two-to-three hours deposition. So it's
14 really not the same issue that deposed him -- they had a
15 long suit about relevant matter before. So I think Mr. Kay
16 has essentially everything in his possession that could
17 possibly be relevant.

18 MR. FENSKE: I honestly cannot respond to that
19 because I just don't know. I would note, for the record,
20 our objection to any limitation on Mr. Barnett when no
21 opposition has been filed. But, beyond that, I cannot add
22 or subtract to anything that's been said.

23 JUDGE SIPPEL: I'm not going to go down and parse
24 the subpoena now, in the absence of him being represented or
25 having expressed an interest in this. But, in general, I

1 would, you know, I expect the same thing to be done with
2 him. There's not going to be a lot of time spent on
3 ancillary information. It's the information that he has
4 with respect to this case, whatever he comes in with, you
5 know, if he's going to comply with the subpoena and he
6 doesn't have much to comply with, you know, you make your
7 record as I'm sure you will and if we have to revisit, we'll
8 revisit. But I'm just trying to anticipate -- not
9 anticipating, I'm just trying to protect him as much as I
10 can up front from feeling that he's overwhelmed, you know,
11 voluminous document requests and a search for documents and
12 all this type of thing. I don't think it's going to happen,
13 because I think we would have heard from him.

14 MR. KNOWLES-KELLETT: Let me -- I may have made an
15 mis-implication, Mr. Barnett, I think was previously
16 represented by a lawyer named Christianson. I do not
17 believe that he will be represented at counsel at the
18 deposition. His indication is he was not, that there's a
19 matter of attorney's fees, and that Mr. Christianson will
20 not be representing him so, I don't know what kind of legal
21 advice he's had with respect to the subpoena. So, it may be
22 a lay person not responding to your order, Your Honor, as
23 opposed to -- as advised by counsel. We don't purport to
24 represent him, at all.

25 JUDGE SIPPEL: All right. Well, what I am --

1 obviously, what I am concerned about from the standpoint of
2 him coming forward with information is with respect to the
3 Schedule A, item 2 documents. You know, that I absolutely
4 want to see any witnesses that are going to be used in this
5 case come forth with that type of -- with that type of
6 descriptive type of information, i.e., communications back
7 and forth between this witness, the third party witness and
8 the Commission. And I think it's basically going to be with
9 respect to some kind of complaints or allegations that were
10 made, vis a vie, Mr. Kay.

11 But, things beyond that, you know, items 1 through
12 -- with the exception of item 2 on this one, I can't -- I'm
13 not going to -- I mean, if he volunteers it, he volunteers
14 it but I'm not expecting to see him -- I would not want a
15 lot of time spent with respect to examining him as to where
16 or why he has not produced those types of documents. You
17 know, just focus on the item 2 type documents and the same
18 ground rules with respect to Mr. Killian. If he says that,
19 well, I was promised confidentiality on, you know, on what I
20 submitted, he's not going to be required to -- you know, you
21 can press him in terms of describing the nature of the
22 documents as best as you -- as much as he's willing to. But
23 the same ground rules will apply there. I mean, we'll
24 eventually come up with, as you say, a Vaughn-type list with
25 respect to those documents and make a determination down the

1 road.

2 But that's all I have. That's all I can have with
3 respect to these two witnesses.

4 MR. KNOWLES-KELLETT: Okay. I'll relay your
5 concern to Mr. Barnett. I told him I would call him and let
6 him know what happened here today.

7 JUDGE SIPPEL: Well then, you can paraphrase what
8 I've said. I mean, to the extent that I can get an order
9 out, you know, in a day or so that covers these points, I'm
10 going to try and do that.

11 MR. KNOWLES-KELLETT: Oh, in which case, Your
12 Honor, I will not paraphrase it. I will wait and fax that
13 to him, if that's acceptable.

14 JUDGE SIPPEL: Well, I think you should call him.
15 No, I think you should call him and tell him that item 2 is
16 --

17 MR. KNOWLES-KELLETT: Okay. I'll tell him that --

18 JUDGE SIPPEL: And tell him that, you know, item 2
19 is --

20 MR. KNOWLES-KELLETT: That you are very concerned
21 about item 2 --

22 JUDGE SIPPEL: Item 2 is fair game but everything
23 else that -- just tell him to focus, you know, that he
24 should be focused on item 2.

25 MR. KNOWLES-KELLETT: Okay.

1 JUDGE SIPPEL: You can tell him about -- I'll just
2 leave it at that. I'll just leave it at that, because we do
3 have time. But there is a time element involved here.

4 Now, does that cover everything with respect to
5 those two witnesses? Here's my list. Let me just interject
6 here and say that, first of all, there's going to be no
7 status report required until mid-February, which will be
8 February 12th. The close of business on that Thursday, and
9 I -- what I would like to -- I'd like that to focus on or
10 give me some more specific information with respect to what
11 the status of the experts are going to be, how their
12 depositions are going to be handled, and when they're going
13 to be, and how far along are you on that kind of planning.

14 The other -- well, the other items obviously is
15 the document request and the notice of deposition, vis a
16 vie, the two Commission witnesses. Let me see if I have
17 that ... that would be Mr. Paul -- how do you pronounce that
18 -- Oei?

19 MR. KNOWLES-KELLETT: Correct, Your Honor.

20 MR. SCHAUBEL: Correct.

21 JUDGE SIPPEL: And then Jim Fontaine --
22 LaFontaine. Are both of those witnesses coming down from
23 Seattle or from --

24 MR. SCHAUBEL: No. Mr. LaFontaine is coming down
25 from Portland and Mr. Oei is in the Commission's L.A. field

1 office.

2 JUDGE SIPPEL: Okay. So just one of them is
3 coming down -- is in the travel mode. All right. I have
4 seen your papers, and I don't want to just repeat what you
5 have already written to me on this. You're taking the
6 position -- let me ask you this, Mr. Schaubel, maybe you can
7 describe for me, what is it, just in general terms, what is
8 it that was given to Mr. Kay's counsel with respect to the
9 inspection reports that these two gentlemen were
10 participating in?

11 MR. SCHAUBEL: Okay. If I can differentiate,
12 there is the more recent round of inspections. We believe
13 that was Mr. Oei, and --

14 JUDGE SIPPEL: Another way I'm asking is question
15 is, what has the Government already given Mr. Kay with
16 respect to these witnesses as far as documents go and
17 obviously I'm focused on the inspection report.

18 MR. KNOWLES-KELLETT: I don't know the precise
19 number of pages, Your Honor, but it's probably 400 pages,
20 both their chart summarizing the results of their inspection
21 that took approximately a month, and individual pages with
22 respect to every station. I think that that is as much as
23 they even want on that. I think that they're -- to the
24 extent that they are searching for anything else, they have
25 to go through the FOIA. And I don't -- it's not our Bureau